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93-1640

No. _____

In The
Supreme Court of the United States
October Term, 1993

NICHOLAS E. TAVAGLIONE,

Respondent,

vs.

MICHAEL C. BILLINGS, MARYANN ARCHAMBAULT, J. RICHARD SWARTZ, ROY E. WHITEHEAD, and RIVERSIDE NATIONAL BANK,

Petitioners.

Petition for Writ of Certiorari to the California Court of Appeal

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Roy Morrow Bell, Esq.
Fletcher W. Paddison, Esq.
Raymond Pepper, Esq.
Miller, Boyko and Bell
550 West "B" Street, Suite 400
San Diego, California 92101
Telephone: (619) 235-4040

Attorneys for Respondent
NICHOLAS E. TAVAGLIONE

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TO THE HONORABLE WILLIAM H. REHNQUIST, CHIEF JUSTICE OF THE UNITED STATES, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondent Nicholas E. Tavaglione respectfully requests that this Court deny the Petition for Writ of Certiorari (the "Petition"). The Petition misrepresents the evidence at trial, and the findings of the California Courts, fails to set forth a legitimate basis for review by the Supreme Court, and does not demonstrate that the "Questions Presented for Review" have been preserved for appeal.

SUMMARY OF ISSUES PRESENTED FOR REVIEW

Question No. (1): Does a state court judgment violate the Fourteenth Amendment's requirement of due process of law by holding defendants[1] liable on the cause of action for breach of the implied covenant of good faith and fair dealing which allegedly was never pled or proven at trial?

Response: The complaint in this matter specifically pled a cause of action for breach of the implied covenant of good faith and fair dealing. Defendants introduced evidence on this cause of action at trial, submitted jury instructions and thereafter extensively argued the substantiality of the evidence supporting this issue on appeal. Defendants, at all times, had "fair notice" of this cause of action.

Question No. (2): Is the state court cause of action against a bank for breach of the implied covenant of good faith and fair dealing preempted?

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[1]For continuity purposes, petitioners shall be referred to herein as "defendants," consistent with the appellate practice in California.

Response: This issue is raised for the first on appeal and has been waived. The issue has never been raised, preserved or passed upon in the state courts below.

In addition, there is no conflict with federal law. Contracts of national banks are generally governed by state law. Here, the trial court gave an instruction, at defendants' request, based upon 12 U.S.C. § 375b and the jury made a finding that this loan did not present more than a normal risk of repayment [JA 1641]. This finding was supported by substantial evidence, and it was never challenged on appeal. Plaintiff's loans were well secured, the Bank did not believe this loan was unsafe and plaintiff has repaid all of his loans. The Court of Appeal held that there was substantial evidence to support a finding that the Bank's refusal to renew to the loan was not based upon plaintiff's credit but was based solely on defendants' intention to remove plaintiff as a director.

OPINION AND JUDGMENT BELOW

On March 10, 1989, judgment was entered against defendants in the Superior Court of the County of Riverside pursuant to jury verdict. The jury's general verdict was supported by answers to special interrogatories. The jury found for plaintiff on each cause of action submitted for illegal removal of a corporate director, defamation, breach of the implied covenant of good faith and fair dealing, interference with contractual relations and intentional and negligent interference with prospective economic advantage.

"[W]here several counts are tried, a general verdict will be sustained if any one count is supported by substantial evidence and is unaffected by error, despite possible insufficiency of evidence as to the remaining counts." *Tavaglione v. Billings*, 4 Cal.4th 1150. [Appendix (hereinafter "App.") B11]. Initially, the Court of Appeal upheld the entire judgment based solely upon the defamation cause of action. However, the jury made separate damage findings on each cause of action, and the separate damage finding on the defamation cause of action did not total all the compensatory damages awarded. The California Supreme Court, in its remand of this matter, held that the Court of Appeal "was required to review and uphold a sufficient number of separate damage findings which, when combined, equalled or exceeded the amount of the judgment." *Tavaglione v. Billings*, 4 Cal.4th at 1159. [App. B15].

On remand in November 1993, the California Court of Appeal upheld the defamation cause of action and the cause of action for breach of the implied covenant of good faith and fair dealing and affirmed the judgment in its entirety which together equalled or exceeded the amount of the judgment. Based upon the defamation cause of action, the Court of Appeal upheld compensatory damages of $604,787 along with the punitive damages of $2,430,000. In addition, and consistent with the directions of the California Supreme Court, the Court of Appeal upheld the remaining compensatory damages of $1,650,000 based on the cause of

action for breach of the implied covenant of good faith and fair dealing.

In upholding the defamation and breach of the implied covenant causes of action, the Court of Appeal found it unnecessary to review three causes of action for intentional interference with contractual relations, intentional interference with prospective economic advantage or negligent interference with prospective economic advantage.[2] The awards under these causes of action would have been sufficient to uphold the judgment.

In this Petition, defendants do not challenge the defamation cause of action, or the damages awarded thereunder. Out of a total award of $4.9 million, defendants' Petition addresses only the breach of the implied covenant cause of action and the $1,650,000 awarded thereunder. The issues presented are not substantiated by the record and are frivolous.

Defendants' Petition attempts to reargue the evidence and misstates the record in the process. Granting of a writ of certiorari is not warranted merely to review the evidence in the lower court's decision. *General Talking Pictures Corp. v. Western Electric Company*, 304 U.S. 175, 178, 58 S.Ct. 849, 851 (1938); *National Labor Relations Board v. Pittsburgh S. S. Co.*, 340 U.S. 498, 503, 71 S.Ct. 453, 456

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[2]The Court of Appeal, in *dicta*, expressed doubt concerning the validity of a cause for damages based upon illegal removal of a corporate director.

(1951). The Court of Appeal criticized the defendants' persistent attempts to reargue the evidence on appeal and stated that:

> In undertaking our review of the numerous and extensive issues raised by defendants in this appeal, we initially were struck by defendants' apparent inability to appreciate that a jury might view the various allegations of plaintiff's complaint and the evidence pertinent thereto in a manner adverse to defendants. In the trial court, defendants adhered steadfastly to the position that defendants' actions, in all respects, were proper. The jury, as evidenced by its verdict, obviously reached a different conclusion, as did the trial court, as evidenced by its denial of defendants' post-trial motions. Although defendants' trial court stance arguably could be characterized as advocacy, we do not fully comprehend defendants' adherence to that stance in this appeal. In other words, despite, what in our view, was an unequivocal message from the jury, defendants on appeal not only persist in their trial court assertions, but now also blame the trial court for their apparent lack of success. [App. A79-A80].

Defendants continue to attack the jury's findings even though the Court of Appeal held that they were supported by substantial evidence.

Defendants not only reargue the evidence, but make several material misstatements of the record. Thus, defendants, state that the "evidence is undisputed that the Bank was aware that plaintiff was no longer credit worthy, and posed a severe risk to the Bank's financial stability. . ." [Petition at p. 22].[3]

The record demonstrated that plaintiff repaid (and indeed overpaid) every loan ever owed to the Bank [App. A35-A36]. All of the Bank's directors testified, at trial, that they believed plaintiff was credit worthy, that his loans were well secured and that he did not pose a financial risk to the Bank [RT 692-697, 984, 254, 1020 and 2198]. The directors were not concerned over plaintiff's loans or his ability to repay them,[4] and plaintiff's loans had never been

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[3]As sole support for this remarkable statement, defendants cite to a single page of testimony where defendant Billings testified that one of plaintiff's tenants had filed bankruptcy and that rent payments to the plaintiff were delayed. This testimony was of marginal relevancy and the property at issue did not involve any of plaintiff's loans with the Bank [RT at 1593].

[4]The following is one example of the extensive testimony on this point:

Q. . . . Did you have concern that he would not be able to repay his loans?

A. No.

[RT 687 (24-26)].

discussed by the board prior to his removal in February.[5] The Court of Appeal found that substantial evidence supported the finding that plaintiff was current on all of his loans until January 1987, when the one loan was not renewed [App. A34-A36]. Thus, there was substantial evidence that plaintiff was not a deadbeat nor a financial risk to the Bank. The jury rejected defendants' argument then, and the Court of Appeal held that the jury's findings were well supported.

The Petition also repeatedly challenges both the California Supreme Court, and the Court of Appeal, in their holdings that the complaint involves separate causes of action rather than one unified cause of action. The Petition wrongfully states that all of the causes of action were

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[5]See, e.g.:

> Q. You do not recall ever coming to a loan committee meeting during that time, that's prior to January 1987, at which Mr. Tavaglione's loans were discussed and any concerns by Mr. Billings or any other loan committee member were raised concerning the defaults or Mr. Tavaglione's ability to repay those loans?
>
> A. I can't recall.
>
> * * *
>
> A. Well, we talked about defaults from time to time. And I just can't pinpoint one with Nick.
>
> Q. So I mean nothing stands out in your mind before 1987 concerning Mr. Tavaglione's loans?
>
> A. Not that I can recall.
>
> Q. And if something had been brought up at a loan committee meeting concerning Mr. Tavaglione's defaults, that would have been reflected in the minutes as far as you are aware?
>
> A. Yes.

[RT 690(15)-691(16)].

dependent upon the cause of action for illegal removal. This incredible statement is simply not supported by any record citations. There were several causes of action alleged in the complaint and proven at trial. The defamation cause of action is not factually or legally dependent upon plaintiff's cause of action for wrongful removal.[6] The cause of action for breach of the implied covenant of good faith and fair dealing was based upon the failure to renew a loan. The California Supreme Court specifically found that there were separate causes of action alleged in the complaint:

> Indeed, as a matter of logic, it would seem unlikely that plaintiff's damages from being defamed by defendants would be identical to the damages he incurred from being ousted from RNB's board of directors. Unlike the cases cited by plaintiff (citation omitted), these theories of recovery seem based on different 'primary' rights and duties of the parties. 4 Cal.4th at 1158. [App. B13].

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[6]Plaintiff sued defendants for falsely publishing defamatory statements that plaintiff had repeated defaults on three separate loans totalling $714,000 and defamatory statements that plaintiff had violated banking and securities laws [JA 171-202]. There was substantial evidence to support the jury's verdict. The court held that the evidence demonstrated that plaintiff was not in default on these loans as published, noting, among other evidence, that defendants were forced to repay plaintiff as a result of his *overpayments* on his loans [App. A34-A36]. The Court of Appeal found it unnecessary to review the defamatory statements by the defendants accusing plaintiff of violating banking and securities laws [App. A31].

In its decision, the California Supreme Court specifically found that the "plaintiff sued defendants on several different causes of action." 4 Cal.4th at 1152. [App. B4].

The Petition's rhetoric seeks to blur the divisions between the causes of action which were separate and distinct. While defendants devote much of their discussion in the body of the Petition to this issue, defendants do not show what relevance it has to the Questions Presented for Review.

ARGUMENT

I.

There Is No Jurisdiction Over the Questions Presented for Review and Defendants Have Failed to Preserve Any Claim of Error.

A. Defendants Have Failed to Raise a Federal Question Meriting Review.

Absent a federal issue, the Supreme Court has no jurisdiction to review the state court judgment. *Cardinale v. Lousiana, supra.* The federal question must have been raised and decided in the state court below. *Id.* In an effort to boot-strap jurisdiction, defendants argue that jurisdiction exists under the Fourteenth Amendment and the Supremacy Clause. The judgment below does not raise a legitimate federal question meriting review.

In addition, United States Supreme Court Rule 10 provides that certiorari is a matter of judicial discretion to be granted only where there are "special and important reasons

therefore." No special and important reasons exist in this case. The Opinion in question was rendered by a California Court of Appeal in an unpublished decision. Petitioners have not raised any arguments concerning the validity of the defamation cause of action. The implied covenant cause of action was determined by the Court of Appeal under California law. The California Supreme Court in denying review found that this case did not involve settlement of an important question of law as required under California Rule of Court 29(a)(i).

Certiorari is appropriate and should be granted only "in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeal." *NLRB v. Pittsburgh S. S. Co.*, 340 U.S. 498, 502, 715 S. Ct. 453, 456 (1951). The United States Supreme Court does not sit to satisfy a scholarly interest in issues and does not sit for the benefit of the particular litigants. *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74, 75 S.Ct. 614, 616 (1955). The questions presented by defendants do not merit review.

B. <u>Defendants Have Failed to Preserve this Issue for Appeal</u>.

Defendants have failed to demonstrate that this Court has jurisdiction under *Cardinale v. Lousiana, supra*. The United States Supreme Court Rule 14.1(h) states as follows:

> If review of a judgment of a state court is sought, the Statement of the case shall also specify the stage in the proceedings, both in the court of first instance and in the appellate courts, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by those courts; and such pertinent quotation of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears . . . as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on a writ of certiorari. When the portions of the record relied upon . . . are voluminous they shall be included in the appendix . . .

The Petition fails to comply with Rule 14 and fails to set forth the point at which the federal question was raised, the method or manner of raising them, and the way they were passed upon by those courts. The omission is intentional because defendants failed to raise these issues in the proceedings below.[7]

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[7]Defendants have consistently failed to include appropriate citations to the record demonstrating that they preserved issues for appeal. The California Court of Appeal held that defendants had waived many alleged claims of error.

Consistent with the appellate practice before the California Courts, defendants, in this Petition, have failed to note the manner in which the federal issues now being asserted were preserved for appeal. Defendants contend that they were denied due process by the trial court's judgment on the implied covenant cause of action. There is no citation to the record that this was raised before the Court of Appeal or the California Supreme Court. Indeed, in asserting 22 issues on appeal, defendants failed to include an argument that the judgment violated due process.

> We are able further to reduce the issues we must address in this appeal by noting defendants' near-total failure to demonstrate that the issues asserted in this appeal were, where necessary, first raised by defendants in the trial court and therefore preserved for review on appeal. . . .[D]efendants' claims of error must include appropriate citations to the record showing where the purported error occurred, and if appropriate, that defendants objected to that error in the proceeding below. 'An appellate court is not required to search the record to determine whether or not [it] supports appellants' claim of error. It is the duty of counsel to refer the reviewing court to the portions of the record which support appellants' position.' [Citation omitted.] Defendants, by failing in their opening and reply briefs to provide anything other than cursory citations to the joint appendix in lieu of clerk's transcript or to the reporter's transcript, have failed, almost without exception, to demonstrate error occurred in the trial court . . . Whatever the possible explanation, defendants generally have not met their burden of demonstrating error in the lower court proceeding [App. A19-A21].

Justice Mosk of the California Supreme Court also noted defendants' repeated failure to preserve issues for appeal. 4 Cal.4th at 1160-1161. [App. B16-B18].

Similarly, defendants never raised an issue of preemption in either the trial court, the Court of Appeal or in its petitions to the California Supreme Court. Defendants, for the first time, raise this issue in their Petition.

Finally, although defendants do not raise an issue in the Questions Presented for Review relating the jury instructions at trial, the body of the Petition contains references to supposedly erroneous jury instructions. These "objections" have been waived.

Under California law, each party must propose complete and comprehensive jury instructions in accordance with its own theory of the case. *See, Downing v. Barrett Mobile Home Transport, Inc.*, 38 Cal.App.3d 519 (1974). When the jury has not been instructed on a particular issue, even where that issue is fundamental to a prompt review of the case, no claim of error will be entertained unless the complaining party requested an instruction on a particular issue. *See, Wickham v. Southland Corp.*, 168 Cal.App.3d 49 (1985); *In re Estate of Martin*, 270 Cal.App.2d 506 (1969); *Bertero v. National Gen. Corp.*, 13 Cal.3d 43, 59 (1974).

Where a challenged instruction presents an incomplete statement of the law, any error will be deemed waived unless an objection to the instruction has been entered. *See, Downing v. Barrett Mobile Home Transport, Inc., supra; Redevelopment Agency v. First Christian Church of Long Beach*, 140 Cal.App.3d 690 (1983); *Delia S. v. Torres*, 134 Cal.App.3d 471, 481 (1982). In order to preserve its

objection, the party who complains that the instruction is too general, lacks clarity or is incomplete "must [also] request the additional or qualifying instruction in order to have the error reviewed." *Dorsic v. Kurtin*, 19 Cal.App.3d 226, 239 (1971). Under the doctrine of invited error, an appellant will not be heard to complain on appeal if he proposed the legally incorrect instruction or one substantially similar thereto. 9 *Witkin*, California Procedure, Appeal, Section 301 (3d ed. 1985).

Although defendants claim that they filed an appropriate objection to the jury instructions, in fact, no objections were made before the trial court. Defendants have conveniently omitted from their Appendix any record substantiating these objections. Further, defendants have failed to show how the challenge to a particular instruction was raised before the California Court of Appeal or how that specific instruction constituted prejudicial error. *See, LeMons v. The Regents of the University of California*, 21 Cal.3d 869 (1978), *See, also* App. A19-A21. In fact, no claim of error on the jury instructions was properly raised before the Court of Appeal. Finally, and as discussed below, any suggestion in the Petition that the jury instruction modeled upon 12 U.S.C. § 375b was incomplete or otherwise in error was waived under the doctrine of invited error. Perhaps most significantly, however, defendants have not raised an issue in the Questions Presented for Review which relates to any of the jury instructions.

II.

There Is No Basis For Review Of Plaintiff's Cause of Action For Breach Of The Implied Covenant Of Good Faith And Fair Dealing.

Petitioner's due process argument is based upon the argument that the Court of Appeal created "out of thin air an absolute duty on the part of the Bank to renew the plaintiff's overdue loans" pursuant to an "implied" or "oral" contract." [Petition, p.3]. This misstates the court's ruling. The Court of Appeal held that the evidence presented at trial was "sufficient to establish either an oral agreement or an agreement implied from [defendant] Billings conduct that defendants, at the very least, would not refuse unreasonably to renew or extend plaintiff's outstanding loans . . ." (Emphasis added.) [App. A42-A43].

No absolute duty was imposed upon defendants. Extensive evidence established an "implied contract between plaintiff and defendants which created a duty on the part of defendants to act in good faith and deal fairly with plaintiff in connection with renewing plaintiff's loans." [App. A41-A44]. This merely required defendants to act reasonably.

The Bank refused to renew plaintiff's loan in January 1987. Plaintiff was current on his loans at the time of the renewal in January 1987 [App. A35-A36]. At this time the Bank directors uniformly believed that plaintiff's loans were well secured and posed no more than a normal risk of

repayment [RT 692-695, 984, 254 and 2198].[8] The jury found that the renewal did not pose a more than normal risk of repayment [JA 1641].

Defendants' statements that the Court of Appeal's opinion created an absolute duty to renew an unsafe loan is a material misstatement of the record. The jury made a finding that the loan was not unsafe. At defendants request, the trial court instructed the jury on the provisions of 12 U.S.C. § 375b, as follows:

> A national bank may not loan money to any of its directors unless loans are made on substantially the same terms as those prevailing at the time for comparable transactions with other persons and do not involve more than the normal risk of repayment or present other unfavorable features [JA 1641].

The jury found that the loan was not unsafe and did not present a more than normal risk of repayment. This finding

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[8]The loan in question was one of a series of short-term (i.e., three- to six-month) loans, each of which had been repeatedly renewed by the Bank. The evidence at trial [See, generally, App. A11-A13, A42-A45] demonstrated that, the Bank notified plaintiff only several weeks after the loan came due, that it would refuse to renew the loan. The Bank, having failed to notify plaintiff of its sudden decision not to renew the loan, also refused to allow him 30 days to pay it off, and instead declared the loan in default. It was proven that the non-renewal was for the purpose of triggering the bylaw so as to expel plaintiff from the board. Stated differently, plaintiff demonstrated that the Bank's handling of his loans was not based upon his credit.

has never been challenged on appeal. Again, defendants simply fail to appreciate that the jury has already considered and rejected the arguments presented by Petitioners.

A. Defendants had "Fair Notice" of Plaintiff's Claims.

Defendants contend that they had no notice of this cause of action and that the judgment therefore violates the Fourteenth Amendment's guarantee of due process. This Court has held that a defendant must be given only "fair notice" of the plaintiff's claims. *New Motor Vehicle Board of the State of California v. Orrin W. Fox Company*, 439 U.S. 96, 125, n. 29 (1978); *Conley v. Gibson*, 355 U.S. 41 (1957) (only a short and plain notice of the claim is required); *See*, F.R.C.P. Rule 8.

In *Self Directed Placement Corp. v. Control Data Corp.*, 908 F.2d 462, 466 (9th Cir. 1990), the court held that the complaint gave defendants proper notice on a claim for unfair competition even though there was no cause of action pled where the prayer contained a demand for relief for unfair competition. *See also, Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707, 714 (8th Cir. 1979). The courts have long held that a defendant is given sufficient due process notice by the mere introduction of evidence at trial thereby allowing amendments to conform to proof. *See* F.R.C.P. Rule 15(b); *Frangos v. Doering Equipment Corp.*, 860 F.2d 70, 74 (1988); *Davis & Cox v. Summa Corp.*, 751 F.2d 1507, 1522 (9th Cir. 1985) ("[I]ssues actually tried by the

consent of the parties are treated in all respects as if they had been raised in the pleadings.") Thus, the introduction of evidence alone constitutes sufficient constitutional notice of a claim.

Here, the complaint clearly stated a cause of action for breach of the implied covenant of good faith and fair dealing and the cause of action was so labeled [App. A40-A41, H1-H33]. Defendants had clear and specific notice of the claim. Petitioners' argument that no cause of action was pled was rejected by the Court of Appeal, which cited the allegation in plaintiff's complaint that defendants "held a duty to plaintiff to deal fairly and in good faith with plaintiff in connection with his loan transactions with the Bank." [App. A41].

Despite Petitioner's shocking assertion that notice of this claim was first given in the Court of Appeal's Opinion, the record on appeal highlights the fact that defendants not only had notice of this claim, but actively litigated it at trial. Defendants admit that evidence was admitted at trial on plaintiff's loan and the basis for the Bank's refusal to renew [Petition at p. 26: "certain evidence of the parties' course of conduct with respect to loans made to plaintiff was received"]. The jury was instructed on issues concerning the implied covenant claim [*see e.g.*, JA 1641, 1644, 1673-1682], including specific instructions on the renewal of the loan. Defendants submitted extensive evidence justifying the refusal to renew, including expert testimony. The California Court of Appeal held that any lack of specificity in the

complaint was cured by the evidence presented at trial [App. A40-A41], and the court and held that it "rejected[ed] defendants' assertion that there was no evidence presented at trial to show defendants had an obligation to renew or extend plaintiff's loans" [App. A43]. Defendants had notice of this claim in the complaint and it was clearly tried with defendants' consent. *Davis & Cox, supra.*

This is further documented by defendants' briefs in this appeal. In their Petition for Review to the California Supreme Court, defendants state as follows:

> [Plaintiff] came up with a new theory <u>at the time of trial</u> . . . that he was not really in default, because the Bank had a duty to renew and extend his loans, and that, if the Bank had done so, he would have been current! (Emphasis added). [Petition at p.4].

Defendants thereby admit that this issue was tried with their consent.

Defendants other briefs in this appeal demonstrate that they had notice of this claim at trial.

> Incredibly, the plaintiff was successful in his claim, at trial, that the bank owed him a duty to renew his delinquent loans, despite there being no prior commitment by the bank that it would renew them. As shown at length in the appellant's opening brief, there is considerable authority establishing that no such duty is

owed by the bank [Appellant's Reply Brief, filed April 1991, at p.25].

In their Opening Brief, defendants argued to the Court of Appeal that:

> [T]he jury was authorized to find that, under the [implied] covenant, the bank was required to give advance notice of any intention to terminate loans to the plaintiff or refuse to renew them. The jury was also instructed that the bank may have breached its covenant of good faith and fair dealing if it did not renew plaintiff's loans for a reasonable period of time in order to allow plaintiff to find a substitute lender, or to obtain a term loan [Appellant's Opening Brief at p. 59].[9]

These are but a few of the numerous instances demonstrating that defendants had notice of this claim, and actively litigated it at trial. Defendants' arguments were simply rejected by a Riverside County jury, the trial court, the Court of Appeal and the California Supreme Court.

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[9]Thereafter, in their Reply Brief, defendants stated that:

> Incredibly, the plaintiff was successful in his claim, at trial, that the bank owed him a duty to renew his delinquent loans, despite there being no prior commitment by the bank that it would renew them. [Appellants' Reply Brief at p. 25 (April 1991)].

B. **This Decision Is Not Preempted by Federal Law.**

Petitioners have not cited any authority supporting their argument that the federal banking statutes preempt all state contract law, for the simple reason that no such authority exists. Under the Supremacy Clause, U.S. Constitution, Article VI, clause 2, "state laws that intervene with, or are contrary to the laws of congress, made in pursuance of the constitution are invalid." *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 111 S.Ct. 2476, 2481 (1991). National banks are subject to all state laws not in conflict with federal statutes. Anderson National Bank v. Luckett, 321 U. S. 233, 64 S. Ct. 599 (1944).

Here, the issue is simply moot because the jury at defendants' request was instructed on federal law. The jury was instructed on the provisions of 12 U.S.C. § 375b. Any alleged error in the instruction constitutes "invited error." Further, defendants failed to preserve this issue for appeal and it has been waived. *United States v. Spector*, 343 U.S. 169, 72 S.Ct. 591 (1952).

Based upon this instruction, the jury found that the loan, or its renewal, did not present more than a normal risk of repayment. Substantial evidence cited above showed that plaintiff was current on his loans and that the loans did not pose a risk to the Bank. In any event, defendants waived any claim that the jury's finding was not supported by substantial

evidence. Defendants have never challenged the sufficiency of the evidence on this finding.

In testing for preemption, "the critical question . . . is always whether Congress intended that federal regulation supersede state law." *Louisiana Public Service Commission v. Federal Commission*, 476 U.S. 355, 369, 106 S.Ct. 1890 (1986). Express preemption exists where Congress has expressly stated its intent to supersede state law. *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 95-98 (1983). The statutes cited by Petitioners do not expressly state an intent to supersede state law.

The federal laws governing national banks do not preempt all state regulation of such banks, rather the operations of national banks are generally subject to state laws, which are displaced only where they "infringe the national banking laws or impose an undue burden on the performance of the banks functions." *Anderson National Bank v. Luckett*, 321 U.S. 233, 248, 64 S.Ct. 599, 607 (1944). State law is then preempted only to the extent it directly conflicts with the federal provisions. *California Federal Savings & Loan Association v. Guerra*, 479 U.S. 272, 281, 107 S.Ct. 683, 689 (1987).

The opinion does not directly conflict with the federal statute. The opinion held that the bank may not unreasonably refuse to renew a loan, where there is a contract, to renew the loan. The jury was instructed on the provisions of § 375b that the renewal could not present an unreasonable risk of

repayment to the Bank. The jury specifically found that renewing plaintiff's loan did not involve more than a normal risk of repayment. The opinion does not conflict with the federal statute.[10]

In *Mortier, supra*, the court found no conflict preemption between federal and state laws in connection with a permit allowing aerial spraying of pesticides. After the town refused the permit to allow the aerial spraying, plaintiff brought an action claiming that the town ordinance was preempted by state and federal law. Section 136t(b) of "FIFRA," the federal statute, stated that the administrator "shall cooperate with . . . any appropriate agency of any state or any political subdivision thereof, in carrying out the provisions of this act. . . ." This court reasoned that FIFRA implied a regulatory partnership between federal, state and local governments, and held that there was no preemption by virtue of an actual conflict.

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[10]National banks have traditionally been "governed in the daily course of business far more by the laws of the State than of the nation. All their contracts are governed and construed by State laws." *National Bank v. Commonwealth*, 76 U.S. 353, 362, 19 L.Ed 701 (1870); 30 Stan. L.Rev.1. Courts have routinely applied state contract law in cases involving national banks. See, e.g., *Wichita Eagle and Bekin Publishing Co., Inc. v. Pacific National Bank*, 493 F.2d 1285 (9th Cir. 1974); *Fowler v. Security First National Bank*, 146 Cal.App.2d 37, 303 P.2d 565 (1956); *Security First National Bank v. Rospaw*, 107 Cal.App.2d 220, 237 P.2d 76 (1951). Regulation of banking has been one of dual federal and state control since the passage of the First National Bank Act in 1863, and the "right to contract, collect debts, and acquire and transfer property are all based on state law." *National State Bank, Elizabeth, N.J. v. Long*, 630 F.2d 981, 985 (3rd Cir. 1980).

Defendants also assert 12 U.S.C. § 1818 as a bases for conflict. Section 1818 provided that if it is determined that a national bank is involved in unsafe or unsound conditions or practices, the board of directors shall notify the appropriate banking agency of this determination. There is no evidence that the board ever notified any agency that plaintiff had an unsafe loan. Defendants' contention that the judgment conflicts with § 1818 is not supported by the record and is without merit.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Petition for Writ a Certiorari be denied.

Respectfully submitted,

Dated: May 13, 1994 MILLER, BOYKO AND BELL

By:_____

Roy Morrow Bell
Fletcher W. Paddison
Raymond Pepper
Attorneys for Respondent
Nicholas E. Tavaglione

PROOF OF SERVICE BY MAIL

State of California

ss.

County of San Diego

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of San Diego, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 550 West "B" Street, Suite 400, San Diego, California 92101; that on May 16, 1994, I served the within *Brief in Opposition to Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Diego, California, addressed as follows:

Clerk, United States Supreme Court
One First Street, N.E.
Washington, D. C. 20543
(By Federal Express: Original and 40 copies)

Clerk, California Court of Appeal
Fourth Appellate District
Division Two
303 West Fifth Street
San Bernardino, California 92401

Clerk, Riverside Superior Court
Honorable John P. Carroll, Judge
County Courthouse
4050 Main Street
Riverside, California 92501

Clerk, Riverside Superior Court
Indio Branch
Honorable H. Morgan Dougherty, Judge
Department C
46-209 Oasis Street
Indio, California 92201

Superior Court Clerk
Riverside County
Post Office Box 431 -- Appeals
Riverside, California 92502

Roy G. Weatherup, Esq.
Rita Gunasekaran, Esq.
Haight, Brown & Bonesteel
1620 26th Street, Suite 4000 North
Post Office Box 680
Santa Monica, California 90406-0608
Attorneys for Petitioners

I declare under penalty of perjury that the foregoing is true and correct. Executed this 16th day of May, 1994, at San Diego, California.

_____
Linda D. Crowe